Supreme Court, U.S.
FILED

09-738 DEC 19 2009

No. 08-16498 OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHN PHILIPPS,

Petitioner,

v.

CITY OF OAKLAND, CALIFORNIA
KAREN P. TANDY, Administrator, U.S. DEA
SCOTT N. SCHOOLS, U.S. Attorney for the N.D. CA
ARNOLD SCHWARZENEGGER,
Governor of the State of California,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

John Philipps
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Oakland, CA 94601-7821
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Petitioner in pro se

QUESTIONS PRESENTED

1. Whether the provisions of 21 U.S.C. S.A. section 822 et seq., rendered it unlawful for the State and Federal Defendants to institute criminal proceedings against Petitioner based on his cultivation of marijuana plants following the issuance to him of a Federal license in the form of an Employer Identification Number assigned by the Department of the Treasury, Internal Revenue Service.

2. Whether the above statute, combined with the Supremacy Clause of article VI of the Constitution, rendered it unlawful for the state Defendants to institute criminal proceedings against Petitioner based on the above set of facts.

3. Whether Respondents' institution of criminal proceedings against Petitioner under the said circumstances was a violation of his Constitutional rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

PARTIES

The petitioner is John Philipps.

The respondents are City of Oakland, California, Karen P. Tandy, Administrator, U.S. DEA Scott N. Schools, U.S. Attorney for the N.D. CA Arnold Schwarzenegger, Governor of the State of California.

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* Please reference original appendix mailed to the court on October 19, 2009.

OPINIONS BELOW

The opinion of the District Court December 14, 2007 is unreported . The orders of the Court of Appeal, July 20, 2009 are likewise unreported.

STATEMENT OF JURISDICTION

The Court of Appeals' judgment was entered on January 27, 2009. A timely petition for rehearing was denied on July 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1) and such other and further provisions of law as the Court thinks proper. This Petition is based on a decision of the District Court, affirmed by the Circuit Court of Appeal, involving Federal statutory and Constitutional issues.

CONSTITUTIONAL AND STATUTORY PROVISIONS, REGULATIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI., provides in relevant part:"{T}he Laws of the United States...shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"

The Fourteenth Amendment to the Constitution provides all citizens with the rights to Due Process and the Equal Protection of the laws.

Title 21, Section 822 (c) of the U.S. Code Provides that:

> certain persons are entitled to possess any controlled substance or list 1 chemical [such as marijuana] without being required to "register" accordingly with the Federal government: "A...warehouseman, or an employee thereof whose possession of the controlled substance or list 1 chemical [is] in the usual course of his business or employment".
> and section 885 provides that no licensure under that Title, once given, shall be revoked.

California Health and Safety Code section 11362.5 makes legal the cultivation and possession of medicinal cannabis under a framework of specified procedures, under which at all relevant times medical marijuana dispensaries have been operating under municipal license in the City of Oakland.

STATEMENT OF THE CASE

This case raises significant issues about the meaning, scope and applicability of 21 U.S.C 822 and its declared exemptions for certain classes of persons from the requirement of "registration" in order to lawfully possess a List 1 substance such as marijuana. These issues have never been addressed and clarified by the courts; and it is in the public interest that this Court do so in a definitive manner, so that Federal and state agencies as well as the public may be clearly informed of the parameters within which possession of marijuana is lawful under Federal law.

In addition, in the light of the clarified meaning to be given to the said statute, it is in the public interest to have clarification of the extent to which 21 U.S.C 822 combines with the Supremacy Clause of article VI of the Constitution to prevent state agencies from enforcing any laws or policies at variance with the said Federal law.

Finally, the enforcement of California and purported Federal law against Petitioner on the facts of this case violated his rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment; and only this Court is qualified to declare the extent of those rights in a manner that will bring the conduct of law enforcement agencies of each of the states into alignment with the U.S. Constitution in relation to all American citizens.

On or about July 30, 2004, Petitioner John Philipps, having operated a marijuana business in the city of Oakland, California, under the name of Oakland Hemp Bank off-site of First Hemp Bank and Distribution Network, having obtained a Federal Tax I.D. number (95-4743693) therefore on or about December 17, 2004, and having been arrested and prosecuted by state and Federal authorities, filed in U.S. District Court for the Northern District of California, Case # C07-03885, against the City of Oakland, the Administrator of the DEA, the U.S. Attorney and the Governor of California. That case is based on a Petition for Declaratory and Injunctive Relief. It alleges that:

> ["Statement of the Case"]"Petitioner is federally licensed to grow and sell marijuana.... Respondents, unless enjoined

by this Court, will continue to attempt to cripple Petitioner's business".

"The State of California enacted the Compassionate Use Act in 1996 in order to make marijuana available for medical purposes. See California Health and Safety Code sec. 11362.5."

"Despite the fact that Petitioner had all necessary permits and paid all taxes due for his business, he was prosecuted...for running his business and...denied a right to earn a living in that Respondent...will not allow him to open a storefront in downtown Oakland."

The suit below is based on causes of action for Equal Protection of the Laws; Right to Earn a Living; Violation of the Supremacy Clause; Access to the Federal Grand Jury; and a Declaration of the Unconstitutionality of 21 U.S.C. 801 et seq., i.e. the bulk of the modern Federal drug laws, although not section 822 which removes the business from the criminal provisions of Title 21.

This Petition relates primarily to the first and third of the above claims.

On December 14, 2007 the District Court wrote an opinion and issued an order dismissing the suit on the principal Constitutional, state law and Title 21 issues. Judgment against Petitioner was entered on April 28, 2008.

Petitioner filed a timely Notice of Appeal. A mental disability which resulted in Petitioner's opposition to one or more of the motions to dismiss being filed late, also prevented Petitioner from filing anything more than a document embodying a rudimentary statement of the basis of his appeal .

Petitioner also tried to acquire legal counsel; however he could not, because the lawyers he contacted opined that his case was too political. He was also prevented from filing prompter or more extensive pleadings by his being in pro per in two other civil cases at the same time, against lawyers who had failed him in their representation in connection with the case that stemmed from the arrest that prompted the subject lawsuit; as well as protests pertaining to Code violations by the City of Oakland about his lawful homing pigeon business. All the above coincidentally occurred in the same week in which the Federal Court pleading was due: October 18, 2007.The Ninth Circuit summarily disposed of the Appeal as set forth in the "Opinions Below" section hereinabove.

Petitioner brings the present Petition because his case does present substantial and meritorious issues, not heretofore resolved by the courts, on which this whole nation deserves and needs clarity, concerning the interactions of 21 USC 822 (c)(2)(3), the Supremacy Clause, and the rights to Due Process and Equal Protection, in relationship to state laws criminalizing the possession and sale of marijuana.

REASONS FOR GRANTING THE PETITION

This Petition should be granted in order to create clarity in an area of the law where there is presently undesirable gaping obscurity, concerning: the immunities conferred by 21 USC 822 (c)(2) (assuming that the entire chapter of which it is a part is Constitutional), the extent to which they are binding on Federal agencies such as the DEA, and to which the Supremacy Clause makes them binding on state agencies; as well as the interplay of the above with the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Does not 21 USC 822 (c) (2) (3) create immunity for someone such as the Petitioner who was acting in the capacity of a "warehouseman", a common carrier, under the language of that statute? Do not the Treasury's issuance to him of a Federal

Tax ID Number, 80-0398589 issued to a business identified as a Federal Medical Marijuana-, and his payment of taxes, constitute a Federal license to proceed with this business enterprise? Does not the DEA, state and city's interference with that business and prosecution of Petitioner accordingly violate the Supremacy, Due Process and Equal Protection Clauses, such that their actions should be declared illegal and enjoined?

We respectfully submit, not only that the answers to all of these questions should be in the affirmative, but that the questions themselves are of more than sufficient legal and practical importance, on a nationwide basis, that they warrant this Court addressing them. In doing so, the Court could resolve vital issues that it left open in Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L.Ed. 2d 1 (2005).

The language of 21 USC 822 (c) plainly creates exceptions, exemptions from Federal requirements of registration for legal possession of the subject controlled substances. The government undeniably has the power to license the cultivation of marijuana. 28 C.F.R. sec. 0.100 (b) (1999); New Hampshire Hemp Council, Inc. v Marshall 203 F.3d 1 (1st Cir. 2000). And 21 USC 885 states that a license once granted shall not be withdrawn.

Petitioner has alleged and presented evidence that, and is entitled to an adjudication of whether, the Federal government, by issuing him a tax identification number and accepting his tax payments, has in fact done so in this case. If it has, it obviously should be enjoined from prosecuting him; and this rule of law should be made known to this entire country.

And if the Federal government has licensed Petitioner's activities, it follows almost by definition that the Supremacy Clause should prevent state or local governments from prosecuting those activities. By harassing Petitioner while allowing other marijuana dispensaries to operate in its territory under state law, without federal licensure, the city of Oakland was clearly depriving Petitioner of Equal Protection of the Laws, per his First Cause of Action in his Petition below. Squaw Valley Development Co. v. Goldberg, 375 F. 3d 936 (9th Cir. 2004).

Thus, contrary to the District Court's findings, Petitioner has stated one or more claims; and claims worthy even of this Court's consideration.

While it is true that Petitioner's opposition to the principal motion to dismiss was filed tardily, and that his filing in the Ninth Circuit fell far short of the formalities of a brief; Petitioner respectfully

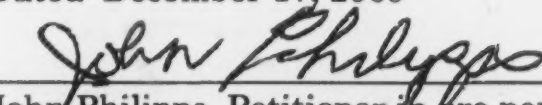
points out that he was and is (a) a pro per litigant, (b) suffering from a mental disability; as well as that (c) the District Court's ruling on the motion to dismiss reached (that Court's perception of) the merits, rendering it ripe for appeal on those merits regardless of the late filing; and (d) his filing with the Ninth Circuit served at least to identify the nature of his exceptions to the lower court's ruling and contentions on appeal, and thereby preserve the record sufficiently for this Court to address the issues raised. Ninth Circuit rules for Federal Judges Pg 11.2c(11.14) In exceptional circumstances, the court may order an immediate mandate. Issued February 19, 2009. Judges had no authority to deny re-hearing. Error mandate May 17, 2009.

It is submitted that under all these circumstances, the substantive nature and importance of the statutory issues and Constitutional rights involved should and do outweigh the technicalities, and warrant this Court's taking up the issues presented.

CONCLUSION

For all the reasons stated, I pray and respectfully move this Court to grant me a Writ of Certiorari.

Dated: December 17, 2009



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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN PHILLIPS, Plaintiff - Appellant, v. CITY OF OAKLAND, CALIFORNIA; et al., Defendants - Appellees.	No. 08-16498 D.C. No. 4:07-cv-03885-CW MEMORANDUM* (Filed January, 27 2009)

Appeal from the United States District Court for the Northern District of California
Claudia Wilken, District Judge, Presiding

Submitted January 20, 2009**

Before: O'SCANNLAIN, SILVERMAN and BYBEE, Circuit Judges.

Upon review of the record and appellant's response to this court's order to show cause, this court hereby summarily affirms the district court's final judgment.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

MF/Pro Se

See United States v. Hooton, 693 F;2d 857 (9th Cir. 1982) (per curiam) (summary affirmance appropriate where result is clear from face of record).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN PHILIPPS Plaintiff, v. CITY OF OAKLAND; KAREN P. TANDY; SCOTT N. SCHOOLS; and ARNOLD SCHWARZENEGGER, Defendants.	No. C 07-3885 CW (Filed: December 14, 2007)

ORDER GRANTING CITY OF OAKLAND'S AND ARNOLD SCHWARZENEGGER'S MOTIONS TO DISMISS

Pro se Plaintiff John Phillips brings this action alleging violations' of his constitutional rights in connection with Defendants' refusal to allow him to operate a storefront marijuana dispensary.

Defendants City of Oakland and California Governor Arnold Schwarzenegger move separately to dismiss the claims against them.[1] In an order dated October 4, 2007, the Court informed Plaintiff that the deadline for filing his opposition to Defendants' motions was October 18, 2007, and that failure to file a timely opposition could result in the motions being granted.

Plaintiff did not file an opposition. The matter was taken under submission on the papers. Having considered the papers filed for Defendants, the Court grants their motions.

BACKGROUND

While the complaint is not clear on the factual details give rise to this lawsuit, Plaintiff alleges that he was criminally prosecuted by the State of California for running a storefront marijuana dispensary. He also maintains that the City of Oakland refuses to allow him to operate such a dispensary in downtown Oakland, even though he possesses a license from the federal government that permits him to grow and sell marijuana .

[1]Defendants Karen P. Tandy, the administrator of the U.S. Drug Enforcement Administration, and Scott N. Schools, the U.S. Attorney for the Northern District of California, have not yet appeared in this action. Any reference in this order to "Defendants" refers only to the City of Oakland and Gov. Schwarzenegger.

Plaintiff claims in his first and second causes of action the City of Oakland's acts violated his Fourteenth Amendment right to equal protection and due process.[2] He claims in his third cause of of action that the City of Oakland and Gov. Schwarzenegger violated the Supremacy Clause of the U.S. Constitution by not allowing him to run a storefront marijuana dispensary, in disregard of his federal license.

LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). When considering a motion to dismiss under Rule 12(b) (6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. See Bell Atl. Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955, 1964 (2007).

[2]Plaintiff's second cause of action is cast as a violation of his "right to earn a living." Because Plaintiff alleges no absence or failure of procedural safeguards in connection with his attempt to open a marijuana dispensary, the Court construes this cause of action to allege a substantive due process violation.

In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b) (6) motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

When granting a motion to dismiss, the court is generally required to grant the plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990). Leave to amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. Id. at 296-97.

DISCUSSION

I. Fourteenth Amendment

Plaintiff claims that the City of Oakland's refusal to let him open a storefront marijuana dispensary violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Because Plaintiff does not allege that he is a member of a protected class, he can succeed on his equal protection claim only by demonstrating that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Squaw Valley Development Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004) (quoting Vill. of Willowbrook v. Olech,528 U.S. 562, 564 (2000)). "Disparate government treatment will survive rational basis scrutiny 'as long as it bears a rational relation to a legitimate state interest.'" Id. (quoting Patel v. Penman, 103 F.3d 868, 875 (9th Cir. 1996)).

The allegations in the complaint do not establish that Plaintiff has been treated differently from similarly situated individuals, let alone in an irrational manner. To the extent Plaintiff's claim is based on the City treating him, as a proprietor of a medical marijuana dispensary, differently from businesspeople who sell other products, his claim must fail. Even though

California's Compassionate Use Act permits the personal use of marijuana for medical reasons, the commercial sale of medicinal marijuana is still illegal under California's criminal law. People ex rel. Lungren v. Peron, 59 Cal. App. 4th 1383, 1389-90(1997). The city of Oakland does permit dispensaries to sell marijuana for medical use, but it limits their number and location. Oakland Mun. Code § 5.80. The City has a legitimate interest in regulating the dispensaries in this way because such regulation may prevent their uncontrolled proliferation, which could pose a threat to public safety, and may ensure that the dispensaries comply with the provisions of the Compassionate Use Act. Cf. Wash. Mercantile Ass'n v. Williams, 733 F.2d 687, 691 (9th Cir. 1984) (government has a legitimate interest in regulating the sale of drug paraphernalia); United States v. Huss, 7 F.3d 1444, 1448 (9th Cir. 1993), overruled on other grounds, United States v . Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998) (government has a legitimate interest in regulating the use of firearms). The complaint alleges no facts suggesting that the City's permit scheme is an irrational means of regulating medical marijuana dispensaries.

As for Plaintiff's due process claim, he is correct that the rights conferred by the Fourteenth Amendment include "some generalized due process right to choose one's field of private employment." Conn v. Gabbert, 526

U.S. 286, 291-292 (1999). However, substantive due process does not provide an individual the unfettered right to earn a living in whatever way he or she desires. Rather, the right is "subject to reasonable government regulation. " Id. at 292. Substantive due process certainly does not entitle an individual to engage in a profession that is criminalized under both state and federal law. Accordingly, Plaintiff's substantive due process claim fails.

II. Supremacy Clause

Plaintiff claims that he possesses a federal license to grow and distribute marijuana and, therefore, the City of Oakland and the State of California have violated the Supremacy Clause of the U.S. Constitution by failing to allow him to operate his business. Marijuana is a Schedule I drug, the possession and distribution of which is a federal criminal offense. 21 U.S.C. §§ 841, 844, 812. The Court takes judicial notice of the fact that the United States government does not issue licenses to individuals who wish to grow and sell marijuana, for medical purposes or otherwise.[3] Because Defendants' actions are not inconsistent with federal law, there is, no basis for Plaintiff's Supremacy Clause claim.

[3]Plaintiff supports his contention that he possesses a federal license by reference to Exhibit A,to the complaint. Exhibit A, however, is nothing more than an IRS payment voucher.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motions to dismiss the claims against them (Docket Nos. 11 and 12), and Plaintiff's first, second and third causes of action are hereby dismissed. The Court finds that any amendment of these claims would be futile because the facts on which they are based are fundamentally incompatible with a legal claim. Accordingly, these claims are dismissed with prejudice. The docket sheet does not reflect whether Defendants Tandy and Schools have been served with process. Plaintiff was required to serve these Defendants by November 27, 2007, within 120 days of filing the complaint. The Court will give Plaintiff until January 28, 2008 to serve these Defendants and file proof of such service with the Court. If he does not do so, the claims against them will be dismissed. Plaintiff is referred to Rule 4(i) of the Federal Rules of Civil Procedure for the requirements of service upon officers of the United States.

IT IS SO ORDERED.

Dated: 12/14/07

CLAUDIA WILKEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

JOHN PHILLIPS Plaintiff v. CITY OF OAKLAND; KAREN P. TANDY; SCOTT N. SCHOOLS; and ARNOLD SCHWARZENEGGER, Defendants.	No. C 07-03885 CW JUDGEMENT

For the reasons set forth in this Court's Order Granting Federal Defendants Motion to Dismiss, IT IS ORDERED AND ADJUDGED
That Plaintiff John Phillips take nothing, that the action be dismissed on the merits, and that each party bear its own costs of action.

Dated at Oakland, California, this 28th day of April, 2008.

RICHARD W. WIEKING
Clerk of Court

By:
SHEILAH CAHILL
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN PHILLIPS, Plaintiff - Appellant, v. CITY OF OAKLAND, CALIFORNIA; et al.. Defendants -Appellees.	No. 08-16498 ORDER (Filed July 20, 2009)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTHERN CALIFORNIA, Oakland (D.C. No. 4:07-cv-03885-CW)

Before: O'SCANNLAIN, SILVERMAN and BYBEE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. See Fed. R. App. P. 40.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banco See Fed. R.

App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

MF/Pro Se

The motion to recall the mandate is denied as unnecessary because the mandate was recalled as issued in error. The mandate shall re-issue in due course.

No further filings shall be accepted in this closed case.

MF/Pro se 08-16498